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1 **7. Date that written notice of the appealed written judgment or order's**
2 **entry was served:** May 12, 2021

3 **8. If the time for filing the notice of appeal was tolled by the timely filing**
4 **of a motion listed in NRAP 4(a)(4):** N/A

5 **9. Date notice of appeal was filed:** June 10, 2021

6 **10. Rule governing the time limit for filing notice of appeal:** NRAP 4(a)

7 **11. Rule granting jurisdiction to review order appealed:** NRAP 3(A)(b)(7)

8 **12. Pending and prior proceedings in this court:** None

9 **13. Proceedings raising same issues (if aware of any pending):** None

10 **14. Procedural history:**

11
12 The parties entered into a Marital Settlement Agreement wherein they
13 agreed to joint legal and joint physical custody of their two (2) minor children,
14 but agreeing that Defendant (hereinafter "Jenea") could temporarily relocate
15 with the children to Idaho for a period of two years. 1 A0009-11. They were
16 issued a Decree of Divorce on April 1, 2016. 1 A0001. Following allegations
17 by Jenea against Plaintiff (hereinafter "Waylon") of child abuse and substance
18 abuse, the Court issued an *Order Suspending Visitation* on June 9, 2017. 2
19 A0281-282. Extensive motion practice ensued. 2 A0285- 417. Therapeutic
20 supervised visitation between Waylon and the children was ordered November
21 30, 2018 (2 A0428-430), and again clarified by Order issued March 15, 2019
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(2 A0460-463). The supervised visitation between the children and their father was to occur twice a month in Idaho. 2 A0428-430; 2 A0460-465. On February 27, 2020, the Court held a hearing on ten (10) pending motions filed by Waylon between March 25, 2019, through February 20, 2020, claiming the supervised therapeutic visitation was not occurring, and one (1) motion filed by Janea on November 22, 2019. 4 A0786-792. Both parties appeared in pro per. 4 A0786-792. As a result of that hearing, on March 6, 2020, the Court issued an Order for the minor children to immediately engage in supervised visitation and therapeutic intervention in Idaho. 4 A0786-792.

On June 26, 2020, Waylon's attorney filed an *Ex Parte Motion to Produce Minor Children and Grant Third-Party Custody Pending Reunification*, claiming the supervised therapeutic visitation had not occurred due to Jenea missing two appointments. 4 A0795-819. On July 1, 2020, the Court issued an *Order to Immediately Produce Minor Children to Court Per NRS 125C.0055 and Notice of Expedited Hearing Re: Custody*. 4 A0821-824. On July 15, 2020, the Court held a hearing. 4 A0847-982. On July 24, 2020, the Court issued an *Order Modifying Temporary Custody of Two Minor Children and Other Related Matters*. 4 A0998-1010. On March 8, 2021, Janea (in pro per) filed a Motion for Change of Custody or Visitation. 4 A01011-1024. On May 3, 2021, Waylon's attorney filed an *Opposition to Mother's*

1 *Motion to Change Custody and Cross Motion for Permanent Custody Order,*
2 which was mailed to Jenea on May 4, 2021. 5 A1038-1053. On May 3, 2021,
3 before receiving the Opposition/Cross Motion, Jenea mailed to the court for
4 filing her Request for Submission which was file stamped May 5, 2021. 5
5 A1057. On May 10, 2021, the Court issued an *Order Denying Defendant's*
6 *Motion for Change of Custody and Entering Permanent Custody Order.* 5
7 A1058-1065. That order granted Waylon's cross motion for a permanent
8 custody order. 5 A1064.

11 **15. Statement of facts:**

13 The parties entered into a Marital Settlement Agreement and were issued
14 a Decree of Divorce on April 1, 2016. 1 A0001-31. They agreed to share joint
15 legal and joint physical custody of their two minor children, Brynlee J. Huber
16 and Bryson W. Huber, twins, born on May 8, 2012. 1 A0009. The parties
17 agreed that Jenea could temporarily relocate from Nevada to Boise, Idaho, with
18 the children for no longer than two (2) years for the purpose of completing her
19 schooling. 1 A0010. Waylon was to have custodial time with the children two
20 weekends a month from Thursday at 6:00 p.m. until Sunday at 6:00 p.m., two
21 weeks during the summer, and alternating holidays. 1 A0009-10. The parties
22 were to meet half-way to exchange the children. 1 A0010.

Following allegations by Jenea against Waylon of child abuse and substance abuse, on June 9, 2017, the Court issued an *Order Suspending Visitation*. 1 A0281-282. Extensive motion practice ensued. 1 A0285- 2 A0416. Therapeutic supervised visitation was ordered November 30, 2018 (2 A0428-430), and again clarified by Order issued March 15, 2019 (2 A0460-465). The supervised visitation between the children and their father was to occur twice a month in Idaho. 2 A0428-430; 2 A0460-465. On February 27, 2020, the Court held a hearing on ten (10) pending motions filed by Waylon between March 25, 2019, through February 20, 2020, claiming the supervised therapeutic visitation was not occurring, and one (1) motion filed by Jenea on November 22, 2019. 4 A0786-792. Both parties appeared in pro per. 4 A0786-792. As a result of that hearing, on March 6, 2020, the Court issued an Order for the minor children to immediately engage in supervised visitation and therapeutic intervention in Idaho. 4 A0786-792.

On June 26, 2020, Waylon's attorney filed an Ex Parte Motion to Produce Minor Children and Grant Third-Party Custody Pending Reunification, claiming the supervised therapeutic visitation had not occurred due to Jenea missing two appointments. 4 A0795-819. This Ex Parte Motion was never sent to Jenea (4 A0851-852) and therefore she was unaware of the details of the allegations against her, or what evidence Waylon was relying on.

1 On July 1, 2020, the Court issued an *Order to Immediately Produce Minor*
2 *Children to Court Per NRS 125C.0055 and Notice of Expedited Hearing Re:*
3 *Custody.* 4 A0821-824. Jenea filed a motion for continuance (4 A0832-834), to
4 which the Court never responded. On July 15, 2020, the Court held a hearing. 4
5 A0847-982. Jenea appeared and brought the children to Nevada as ordered. 4
6 A0986. The transcript from that hearing reflects that Jenea had not been
7 provided with the Ex Parte Motion (4 A0851-852), nor the status report
8 attached to it from the counselor that children had seen (4 A0852) which was
9 introduced as evidence.
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13 On July 24, 2020, the Court issued an *Order Modifying Temporary*
14 *Custody of Two Minor Children and Other Related Matters.* 4 A0998-1010.
15 That Order granted Waylon temporary sole physical custody of the children
16 and ordered that the parties would continue to share joint legal custody. 4
17 A1007. Mother was granted supervised visitation via telephone or audio/visual
18 format each evening. 4 A1007. Father was to employee Dr. Herbert Coard to
19 assist with the reunification process. 4 A1007-1008. Both Waylon and Jenea
20 were to cooperate with Dr. Coard so he could evaluate, diagnosis and formulate
21 a treatment and/or reunification plan for the children and parents. 4 A1007-
22 1008.
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On March 8, 2021, Jenea (in pro per) filed a *Motion for Change of Custody or Visitation*. 4 A01011-1024. On May 3, 2021, Waylon's attorney filed an *Opposition to Mother's Motion to Change Custody and Cross Motion for Permanent Custody Order*, which was mailed to Jenea on May 4, 2021. 5 A1038-1053. On May 3, 2021, Jenea mailed in for filing her Request for Submission of her March 8th Motion, which was received and file stamped by the Court on May 5, 2021. 5 A1057. On May 10, 2021, the Court issued an *Order Denying Defendant's Motion for Change of Custody and Entering Permanent Custody Order*. 5 A1058-1065. That order granted Waylon's countermotion to confirm the temporary order as a permanent custody order. 5 A1064.

16. Issues on appeal:

Jenea was denied basic procedural due process at multiple junctures, the end result of which was a permanent modification of custody (1) without affording her the opportunity to receive notice of allegations, evidence and witnesses used against her at an expedited hearing and without even the most basic opportunity to file responsive pleadings, (2) without an evidentiary hearing when she subsequently presented a prima facie case for modification of custody, (3) by application of the incorrect legal standard which shifted the burden to her when the burden of proof for the final custody order should have

1 been on Waylon who was requesting the permanent modification of custody,
2 and (4) without substantial evidence to support the permanent modification of
3 custody.
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5 1) The hearing on July 15, 2020, was on an Ex Parte Motion of which
6 Janea never received notice, and therefore she was never afforded the
7 opportunity to respond. The Ex Parte Motion resulted in an evidentiary hearing
8 two weeks from the issuance of the July 1, 2020 *Order to Immediately Produce*
9 *Minor Children to Court Per NRS 125C.0055 and Notice of Expedited Hearing*
10 *Re: Custody*. At that July 15th hearing, witnesses and evidence were presented
11 to which Janea had no prior notice nor opportunity to refute. It was the
12 quintessential example of trial by ambush.
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16 The July 24, 2020, *Order Modifying Temporary Custody of Two Minor*
17 *Children and Other Related Matters* made extensive findings regarding Jenea's
18 non-compliance with previous court orders, which would have more
19 appropriately been the subject of a motion for contempt. A motion for
20 contempt requires prior notice and the opportunity to be heard, which was not
21 afforded to Jenea.
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25 As Jenea was never provided a copy of the June 26, 2020 Ex Parte
26 Motion, she could not respond prior to the hearing which took place
27 approximately two weeks later. The result of that hearing was the "temporary"
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1 modification of custody which stayed in place for the next year without a
2 review hearing being set by the court. That temporary order later was changed
3 to a permanent modification of custody, and again, without affording Jenea the
4 opportunity to respond. The Court issued its May 10, 2021, *Order Denying*
5 *Defendant's Motion for Change of Custody and Entering Permanent Custody*
6 *Order*, granting Waylon's cross motion for permanent custody order within
7
8 seven (7) days of his filing, without allowing Jenea the opportunity to respond.
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11 2) The Court denied Jenea's motion and granted Waylon's cross motion
12 without a holding an evidentiary hearing. The issues both parties presented
13 made *prima facie* cases for modification of custody and therefore an
14 evidentiary hearing should have occurred before a final ruling on modification
15 of custody.
16

17
18 3) In its May 10, 2021, *Order Denying Defendant's Motion for Change*
19 *of Custody and Entering Permanent Custody Order*, the Court found that Jenea
20 had not met the burden of *Ellis v. Carucci* to modify the temporary custody
21 order, and therefore granted Waylon's cross motion for a permanent custody
22 order. This resulted in Waylon obtaining a permanent modification of custody
23 without Jenea ever having the opportunity to file an opposition and without
24 giving her the opportunity to have a hearing to make factual findings as a basis
25 for the permanent modification.
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1 4) The May 10, 2021, *Order Denying Defendant's Motion for Change of*
2 *Custody and Entering Permanent Custody Order* was based only on the
3 pleadings and not supported by substantial evidence.
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5 **17. Legal argument:**

6 **A. Standard of Review**

7
8 This court reviews a child custody decision for an abuse of discretion.
9 *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 241 (2007). In reviewing
10 child custody determinations, this court will affirm the district court's
11 determinations if they are supported by substantial evidence. *Id.* at 149, 161
12 P.3d at 242. Substantial evidence is that which a reasonable person may accept
13 as adequate to sustain a judgment. *Id.* When making a custody determination,
14 the sole consideration is the best interest of the child. NRS 125C.0035(1);
15 *David v. Ewalfo*, 131 Nev. 445, 451, 352 P.3d 1139, 1143 (2015). Further, we
16 presume the district court properly exercised its discretion in determining the
17 child's best interest. *Flynn v. Flynn*, 120 Nev. 436, 440, 92 P.3d 1224, 1226-27
18 (2004).
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23 **B. Legal Analysis of Issues on Appeal**

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25 **1) Appellant was not provided with notice and the opportunity to**
26 **respond to two motions, both of which altered the custody of the parties'**
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1 **children, the first on a temporary basis, and the second on a permanent**
2 **basis.**

3 The Sixth Judicial District Court has no local rules specific to its district,
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5 therefore the Rules of the District Courts of the State of Nevada are the
6
7 controlling court rules. There are no rules in the District Court Rules pertaining
8
9 to ex parte relief. The rule which applies to general motion practice is District
10 Court Rule 13, which states,

11 Motions: Procedure for making motions; affidavits; renewal,
12 rehearing of motions.

13 1. All motions shall contain a notice of motion, with due
14 proof of the service of the same, setting the matter on the court's
15 law day or at some other time fixed by the court or clerk.

16 2. A party filing a motion shall also serve and file with it
17 a memorandum of points and authorities in support of each
18 ground thereof. The absence of such memorandum may be
19 construed as an admission that the motion is not meritorious
20 and cause for its denial or as a waiver of all grounds not so
21 supported.

22 3. Within 10 days after the service of the motion, the
23 opposing party shall serve and file his written opposition
24 thereto, together with a memorandum of points and authorities
25 and supporting affidavits, if any, stating facts showing why the
26 motion should be denied. Failure of the opposing party to serve
27 and file his written opposition may be construed as an
28 admission that the motion is meritorious and a consent to
granting the same.

 4. The moving party may serve and file reply points and
authorities within 5 days after service of the answering points
and authorities. Upon the expiration of the 5-day period, either
party may notify the calendar clerk to submit the matter for
decision by filing and serving all parties with a written request
for submission of the motion on a form supplied by the calendar

1 clerk. A copy of the form shall be delivered to the calendar
2 clerk, and proof of service shall be filed in the action.

3 5. The affidavits to be used by either party shall identify
4 the affiant, the party on whose behalf it is submitted, and the
5 motion or application to which it pertains and shall be served
6 and filed with the motion, or opposition to which it relates.

7 Affidavits shall contain only factual, evidentiary matter,
8 shall conform with the requirements of NRCp 56(e), and shall
9 avoid mere general conclusions or argument. Affidavits
10 substantially defective in these respects may be stricken, wholly
11 or in part.

12 6. Factual contentions involved in any pre-trial or post-
13 trial motion shall be initially presented and heard upon
14 affidavits. Oral testimony may be received at the hearing with
15 the approval of the court, or the court may set the matter for a
16 hearing at a time in the future and allow oral examination of the
17 affiants to resolve factual issues shown by the affidavits to be in
18 dispute.

19 7. No motion once heard and disposed of shall be
20 renewed in the same cause, nor shall the same matters therein
21 embraced be reheard, unless by leave of the court granted upon
22 motion therefor, after notice of such motion to the adverse
23 parties.

24 Consistent with DCR13(1), a party requesting relief must generally serve the
25 opposing party with a copy of his or her motion, attaching proof of service.

26 Service of the motion is required so that courts cannot infringe on an
27 individual's rights without notice. Ex Parte motions are generally disfavored
28 because the opposing party is not provided with notice and the Court is unable
to her both sides of the issue prior to rendering a decision. "A party must be
given reasonable advance notice of an issue to be raised and an opportunity to

1 respond.” *Anastassatos v. Anastassatos*, 112 Nev. 317, 320, 913 P.2d 652, 653
2 (1996).

3 The Court arguably had authority pursuant to NRS 125C.0055 and NRS
4 125C.0045(1) to hold a hearing regarding Waylon’s Ex Parte Motion and make
5 temporary modifications regarding custody of the children. It would stand to
6 reason that despite it being an expedited hearing, Jenea should have at the very
7 least been provided a copy of the Ex Parte Motion so she could prepare to
8 address those issues at the hearing on the Ex Parte Motion. The Court made
9 extensive findings against Jenea without affording her the opportunity to know
10 what allegations were being made, who would be testifying against her, or
11 what information was being used against her. She could not be expected to be
12 prepared for such allegations without prior notice.

13 The Court did not have any legal basis to disregard Jenea’s right to
14 oppose Waylon’s May 5, 2021 “cross motion” requesting a final custody order,
15 as she had the right under DCR13 to file a written opposition.

16 The most troubling aspect of the July 24, 2020 *Order Modifying Temporary*
17 *Custody of Two Minor Children and Other Related Matters* is that the
18 extensive and cumulative findings made against Jenea would have
19 appropriately been the subject of contempt proceedings. The Court finds fault
20 with Jenea’s former compliance with court orders and bases its modification of
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1 custody on her non-compliance, even finding that Jenea was prospectively in
2 contempt of a no-contact order between her husband and the children when her
3 husband had not yet even been released from jail.
4

5 Moving past the puzzling premise that a person could be prospectively in
6 contempt of a court order, had Jenea been afforded an opportunity to know the
7 allegations against her, she could have raised legal arguments such as a "...
8 court may not use changes of custody as a sword to punish parental
9 misconduct; disobedience of court orders is punishable in other ways." *Sims v.*
10 *Sims*, 109 Nev. 1146, 1149, 865 P.2d 328, 330 (1993). She could have brought
11 evidence in support of her efforts toward compliance. She could have asserted
12 legal arguments such as those set forth in *Lewis v. Lewis*, which addressed the
13 effect of parental contempt on custody orders:
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18 The written order stated that the custody modification was in
19 the child's best interest because of Wesley's actions in the
20 months prior to the order, which included his failure to follow
21 the court's order. In its oral pronouncement as to the best
22 interest of the child, the district court specifically spoke of
23 Wesley's failure to pay child support and his failure to follow
24 court orders as factors that it considered. Because Wesley's
25 failure to follow court orders may not be considered as a factor
26 in determining the child's best interest during a modification of
27 custody, we hold that the district court abused its discretion.
28

Id., 132 Nev. 453, 458, 373 P.3d 878, 882 (2016). Jenea could not prepare to
offer such an argument because she was provided no notice.

1 Motions regarding contempt require prior notice and an opportunity to
2 be heard. The Ex Parte Motion was actually a contempt motion in the guise of
3 a custody motion.
4

5 Due process rights to notice are so fundamental in contempt proceedings
6 that pursuant to NRS 22.030(2), in the event a “contempt is not committed in
7 the immediate view and presence of the court or judge at chambers, an
8 affidavit must be represented to the court or judge of the facts constituting
9 contempt...” Failure to provide an affidavit which, on its face, states the
10 substantive facts which would constitute contempt is the equivalent of failing
11 to provide any affidavit whatsoever. See *Awad v. Wright*, 106 Nev. 407, 794
12 P.2d 713 (1990) (overruled on other grounds). A recent analysis regarding
13 affidavits in contempt proceedings was provided in *Bohannon v. Eighth*
14 *Judicial District Court*, Nev. Adv. Op (March 21, 2017):
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19 A sufficient affidavit provides the jurisdictional basis for a district
20 court to preside over indirect contempt proceedings. *Awad v.*
21 *Wright*, 106 Nev. 409, 411, 794 P.2d 713, 715 (1990)(abrogated on
22 other grounds by *Pengilly v. Rancho Santa Fe Homeowners Ass’n*,
23 116 Nev. 646, 5 P.3d 569 (2000)). This affidavit must contain
24 “sufficient facts...to set the power of the court in motion.” *Strait v.*
25 *Williams*, 18 Nev. 430, 431, 4 P. 1083, 1083 (1884); *see also Whittle*
26 *v. Seehusen*, 748 P.2d 1382, 1387 (Idaho Ct. App. 1987), *cited with*
27 *approval in Awad*, 106 Nev. at 409, 794 P.2d at 715 (holding that to
28 be sufficient, an affidavit must state a prima facie case against the
contemnor).

1 *Id.* at p. 4. When such an affidavit is required but not provided, the district
2 court lacks jurisdiction to hold the party in contempt. *Awad*, 106 Nev. at 409,
3 794 P.2d at 714-715.

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5 The need for an evidentiary hearing is especially significant in a case
6 where there is a dispute between the parties as to the alleged facts in an indirect
7 contempt proceeding. For a contempt charge to stand, the contemnor should be
8 afforded the opportunity to offer testimony on his behalf at an evidentiary
9 hearing, lest a violation of his/her due process rights occur. *Awad v. Wright*,
10 106 Nev. 409, 411, 794 P.2d 713, 716 (1990)(abrogated on other grounds by
11 *Pengilly v. Rancho Santa Fe Homeowners Ass'n*, 116 Nev. 646, 5 P.3d 569
12 (2000).
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16 All of these procedural safeguards for contempt proceedings are
17 premised on the concept of prior notice and opportunity to respond. The prior
18 notice of the Affidavit alleging facts constituting contempt would as a matter of
19 course provide notice to the opposing party. Waylon attached such an Affidavit
20 to his Ex Parte Motion, but as the Ex Parte Motion was never provided to
21 Jenea, she could not know what the allegations were.
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24 The two Orders from the District Court issued on July 24, 2020, and May 10,
25 2021, are inextricably intertwined. The May 10, 2021, *Order Denying*
26 *Defendant's Motion for Change of Custody and Entering Permanent Custody*
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Order from which Jenea appeals is based on the July 24, 2020, *Order Modifying Temporary Custody of Two Minor Children and Other Related Matters* and both were based on severe procedural deficiencies. The May 10, 2021, *Order Denying Defendant's Motion for Change of Custody and Entering Permanent Custody Order* is akin to “fruit from the poisonous tree” of the Temporary Order. The July 24, 2020, *Order Modifying Temporary Custody of Two Minor Children and Other Related Matters* was not an appealable order, as it was not a final order, and therefore Jenea exercised her option for appeal at her earliest opportunity.

2) The Court erred in finding that Jenea had not presented a prima facie case requiring a hearing to review custody.

When faced with the issue of “whether a district court *must* hold a hearing on a motion to modify custody, or whether a district court may decide such a motion on affidavits and points and authorities alone” the Supreme Court ruled in *Rooney v. Rooney*, 109 Nev. 540, 853 P.2d 123 (1993), that “we hereby adopt an “adequate cause” standard. That is, we hold that a district court has the discretion to deny a motion to modify custody without holding a hearing unless the moving party demonstrates “adequate cause” for holding a hearing.” (Citations omitted.) The Court described,

1 “Adequate cause” requires something more than allegations
2 which, if proven, might permit inferences sufficient to establish
3 ground for a custody change. *Roorda v. Roorda*, 25 Wash.App.
4 849, 611 P.2d 794, 796 (1980). “Adequate cause” arises when
5 the moving party presents a prima facie case for modification.
6 To constitute a prima facie case it must be shown that: (1) the
7 facts alleged in the affidavits are relevant to the grounds for
8 modification; and (2) the evidence is not merely cumulative or
9 impeaching. *Roorda*, 611. P.2d at 796.

10 *Rooney* 853 P.2d at 125.

11 In her March 8, 2021 Motion, Jenea presented several factors relevant to
12 the grounds for modification of custody: the children making comments to her
13 that lead Jena to conclude that Waylon was portraying her to the children as
14 someone who is bad; the children had not participated in reunification therapy
15 as ordered after going into Waylon’s custody; Jenea’s attempts to communicate
16 with the court ordered reunification professional, Dr. Coard, were being
17 ignored and she could ascertain no progress in the process ordered by the
18 Court; the lack of the children’s involvement with court ordered therapeutic
19 process was to the children’s detriment.

20 Her presentation of these issues to the Court warranted a hearing on
21 custody modification. These were new facts and not merely cumulative or
22 impeaching. When Waylon made similar allegations in his June 26, 2020 Ex
23 Parte Motion that Jenea had not complied with reunification therapy by
24 missing two appointments, it rose to the occasion of the Court holding an
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1 expedited hearing and changing temporary custody of the children. By way of
2 the Court's own example, the allegations by Jenea that the children had not
3 participated in reunification therapy while in Waylon's exclusive custody
4 should have been reason enough to hold an evidentiary hearing.
5

6 **3) The Court erred in the legal standard applied to the final custody**
7 **determination.**
8

9 Here, the court issued a temporary order modifying custody. As
10 discussed above, Jenea had no notice of the Ex Parte Motion, nor was she
11 allowed the time to file a response. At the time of the hearing on Waylon's Ex
12 Parte Motion, Jenea had *de facto* primary physical custody of the children and
13 had for several years, as Waylon had no visitation other than the previously
14 ordered supervised therapeutic visitation.
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17 At the July 15, 2020 hearing on Waylon's Ex Parte Motion, the Court
18 concluded that it was in the best interests of the children for Waylon to have
19 temporary sole physical custody. The Court did not make a finding of a
20 substantial change in circumstances, however, this may have been harmless
21 error as the factual findings were extensive and may have been construed as a
22 substantial change in circumstances. In any event, the temporary order resulted
23 in a modification of custody from which no appeal could be obtained by Jenea.
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1 When Jenea filed her Motion to Modify the temporary custody order, the
2 Court applied the burden set forth in *Ellis v. Carucci* to her and found that she
3 had not shown a substantial change in circumstances warranting a modification
4 of the temporary custody order. This constructively resulted in Waylon
5 circumventing the legal burden of proof required of him to modify custody and
6 allowed him to obtain a change of custody without notice and the opportunity
7 to be heard from the other party, and without meeting the legal burden of proof
8 that normally would require a noticed evidentiary hearing to prove up the
9 substantial change in circumstances, and the best interests of the children.
10

11 The Court sets burdens of proof for modifications of custody based on
12 the custody scenario being modified. *Rivero v. Rivero*, 125 Nev. 410, 429, 216
13 P.3d 213, 227 (2009). This Court needs to clarify that temporary custody
14 orders do not create the custody scenario basis the court uses to establish the
15 standard of proof for modification. It should be clarified that the custody
16 scenario prior to the temporary order establishes what standard of proof is
17 necessary for modification. If a party is allowed to get a temporary
18 modification of custody without due process thereby changing *de facto*
19 custody, and the court thereafter shifts the burden to the other parent on the
20 basis of evaluating the temporary custody scenario as the baseline, it
21 incentivizes parents to make wild and unsupported claims just to obtain a
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1 temporary order and a legal advantage to lessen their burden in obtaining a
2 modification of custody.

3 In the 1968 case of *Murphy v. Murphy*, a similar issue was addressed and
4 the Court concluded,
5

6 The unqualified contention that there need be no change of
7 circumstances shown when a temporary custody award is
8 sought to be modified is unsound. The temporary award
9 changed by the trial court was made almost four years ago. The
10 reasons for requiring a change of circumstances before allowing
11 modification of a permanent custody decree are present
12 here. *Martin v. Hendon*, 224 Ga. 221, 160 S.E.2d 893 (1968).

13 *Id.* 84 Nev. 710, 711, 447 P.2d 664, 665 (1968). Jenea asserts that the finding
14 in *Murphy* is not applicable to her case, as the temporary order was only in
15 effect for less than a year before she sought to modify it. Inasmuch as this
16 Court may find *Murphy* applicable, the Court should overturn *Murphy* to the
17 extent that it requires the Court to apply modification standards based on what
18 the temporary orders established. ¹
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22 ¹ *Murphy* was overturned by *Ellis v. Carucci*, 161 P. 3d 239 (2007), as to the
23 standard for establishing a change in custody, but only as to the requirement
24 that the court find a change in the circumstances of the parents which was
25 modified by *Ellis v. Carruci* to a change in circumstance effecting the welfare
26 of the child.
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1 **4) Substantial evidence did not support the Court’s findings for**
2 **permanent custody order.**

3 The court made many findings in its May 10, 2021, *Order Denying*
4 *Defendant’s Motion for Change of Custody and Entering Permanent Custody*
5 *Order*. Those findings were based on the facts stated in Waylon’s May 3, 2021
6 Opposition and Cross Motion, to which Jenea had no opportunity to respond or
7 refute. Waylon attached one letter to his motion from the children’s school, but
8 this letter could not have been admitted as evidence since there was no hearing
9 on the matter. That means that the only evidence Waylon presented in support
10 of his motion was the motion itself and his declaration in support.
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12 If the Court took every party on their word alone then it would
13 undermine the guaranty of due process. There would be no need for our entire
14 legal process that is generally predicated upon making a claim against an
15 adverse party, giving notice of that claim to the adverse party, allowing them to
16 respond, affording the parties the right to investigate claims to present evidence
17 in support of their positions to a trier of fact who ultimately rationalizes the
18 evidence presented to make a reasoned final determination. No such process
19 was allowed in this case. The Court abused its discretion by taking Waylon on
20 his word without even allowing a response from Jenea.
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Conclusion

Lost in the court's rush to be done with this case without allowing for due process is consideration of the impact on the children who went from being in their mother's primary physical custody for years to now only being allowed telephone/audiovisual contact and no specific in-person visitation with her.

This most restrictive visitation is not based on a finding of abuse or abduction by her, but based on Waylon's Ex Parte Motion which alleged she missed two therapy appointments for the children and the Court's finding that she was not following court orders. Those issues would have properly been the subject for contempt proceedings, of which Jenea would have been required to receive proper notice and the opportunity to respond.

The Court ordered specific reunification therapy and stated that Jenea's future visitation was dependent on the recommendations of the therapist, but when Jenea presented evidence that the therapist refused to communicate with her despite repeated requests, the Court ignored her. Instead, the Court chose to believe Waylon's position without any supporting evidence that Dr. Coard was not being responsive because Jenea had not met her financial obligations.

These conflicting positions alone warrant an evidentiary hearing to determine if Waylon is merely alienating Jenea from her only lifeline to visitation with the children, the way Waylon felt Jenea had done to him for so long.

1 What is troubling is that the Court was overly cautious to ensure that
2 Waylon got due process when it issued its April 22, 2021 *Order Regarding*
3 *Improper Service*, basically directing Waylon's attorney to file an Opposition
4 to a Motion where a Proof of Service had already been filed, on the off-chance
5 that Jenea had not properly served her motion. When tasked with reviewing the
6 pleadings filed thereafter, however, the Court completely missed the fact that
7 Jenea signed and mailed-in for filing on May 3, 2021, her Request for
8 Submission that was subsequently file stamped May 5, 2021. Waylon's
9 Opposition and Counter-motion was file stamped May 3, 2021, and the
10 Certificate of Service attached to the pleading reflects that it was mailed to
11 Jenea on May 4, 2021. It should have been clear that Jenea did not see the
12 Opposition before mailing in her Request for Submission for filing. Also, she
13 only submitted her motion, not Waylon's cross motion. When the Court issued
14 its Permanent Custody Order on May 10, 2021, there had not even been the
15 standard time elapsed for Jenea to respond to Waylon's Cross Motion, nor had
16 his motion been submitted to the court. It was not ripe.

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19 This Court should reverse the May 10, 2021 *Order Denying Defendant's*
20 *Motion for Change of custody and Entering Permanent Custody Order* based
21 on insufficient due process, insufficient supporting evidence, and application of
22 incorrect legal standard. As a related and inextricably intertwined matter, this
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1 Court should reverse the July 24, 2020 *Order Modifying Temporary Custody of*
2 *Two Minor Children and Other Related Matters*, from which Jenea could not
3 appeal, but which established the deficient procedural basis for the May 10,
4 2021 Order.

6 This Court should give specific instructions for the District Court to
7 conduct a new custody hearing allowing Jenea the opportunity to present
8 evidence on her behalf regarding allegations made in Waylon's June 26, 2020
9 Ex Parte Motion, directing the district court to apply the burden of proof for a
10 modification of primary physical custody to Waylon including specific
11 findings as to substantial change in circumstances between the Court's March
12 6, 2020 Order and the June 26, 2020 Ex Parte Motion; that Waylon not be
13 allowed to use the Court's procedural due process violations after the July 1,
14 2021 Order as a basis for his substantial change in circumstances.

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19 **ROUTING STATEMENT**

20 Pursuant to NRAP 17(b)(5), this case involving family law matters is
21 presumptively heard by the Court of Appeals, and no exception to that
22 presumption applies.

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25 **VERIFICATION/CERTIFICATE OF COMPLIANCE**

26 I hereby certify that this fast track statement complies with the
27 formatting requirements of NRAP 32(a)(4), the typeface requirements of
28

NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word and a size 14 Times New Roman font.

Undersigned further certifies that this brief complies with the page limitations of NRAP 3E(e)(2) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and does not exceed 7,267 words. According to Microsoft Word, the word count of this document is 6,129.

Undersigned certifies that I have read this brief and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28, which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity.

DATED this 20th day of September, 2021.
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AFFIRMATION

Pursuant to NRS 239B.030 the undersigned affirms that the preceding document does not contain the personal information of any person as defined by NRS 603A.040.

CERTIFICATE OF SERVICE

I certify that I am an employee working for BITTNER LEGAL, LLC, and am a citizen of the United States, over twenty-one years of age, not a party to the within action. My business address is 1225 Westfield Ave., Suite #7, Reno, NV 89509.

On the 21st day of September, 2021, I caused to be delivered a true and correct copy of the within document via

X U.S. First Class Mail, deposited for mailing with sufficient postage prepaid, addressed as follows:

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/s/ Elizabeth M. Bittner
ELIZABETH M. BITTNER